Petition

81-459

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ALEXANDER L. STEVAS,
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONSOLIDATED OIL & GAS, INC.

PETITIONER

VS

MATTHEW W. DIETZ AND T. J. YANCEY

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JACOB G. HORNBERGER
JACOB G. HORNBERGER, JR.
915 Victoria Street
Laredo, Texas 78040
512 72 2-6421

ATTORNEYS FOR PETITIONER

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CONSOLIDATED OIL & GAS, INC.

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RESPONDENTS

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

The Petitioner, Consolidated Oil & Gas, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit

(affirming the judgment of the District Court) entered in this proceeding on April 27, 1981, and to the order of that Court dated May 20, 1981, denying the Petitioner's Petition for Rehearing.

The Petitioner, Consolidated Oil and Gas, Inc. is a parent corporation and the following have an interest in the outcome of this case:

Consolidated Oil and Gas, Inc.
Gulf Oil Corporation
Texas Oil & Gas Corp.
Supron Energy Corp.
Ramco, Inc.
Dwight S. Ramsay

for Petitioner

Matthew W. Dietz
T. J. Yancey

for Respondents

QUESTION PRESENTED

1. Did the Court below err in admitting into evidence, over the proper objection of the defendant (Petitioner herein) testimony by the Plaintiff, Yancey, (one of the Respondents herein), regarding what he could have sold the 59 acres of onions in question for immediately prior to October 29, 1975, the date of the rain that allegedly damaged the crop?

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OPINIONS BELOW

The judgment of the United States District Court appears at pages App. 56 thru 62 of the Appendix attached hereto. The judgment of the United States Court of Appeals for the Fifth Circuit appears at pages App. 1-2 and the Opinion of said Court appears at pages App. 3 thru 37 of said Appendix. The Order Denying the Petition for Rehearing in the United States Court of Appeals appears at pages App. 38-39 of said Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 1-2) was entered April 27, 1981. A timely petition for rehearing was denied on May 20, 1981. The jurisdiction of this Court is invoked under the provisions of 28 USC, Section 1254.

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

None

STATEMENT OF THE CASE

Petitioner, Consolidated Oil & Gas, Inc., is in the business of drilling for and the production of oil and gas. The Respondents, Dietz and Yancey, are farmers in the Laredo,

Texas, area. The property where the alleged crop damage occurred is known as the Hereford Farm in Webb County, Texas. The Petitioner was drilling its third well on the Hereford Farm, and built a road to the wellsite between October 6 and October 15, 1975. The well was butted in on October 18, 1975. The Respondents started growing their crop of onions in September or October, 1975. The jury found that the petitioner was negligent in the manner it constructed the road, that the petitioner was negligent in the manner it constructed its slush pit at the drillsite, and awarded damages for the alleged damage to the onion crop in the total amount of $41,300.00 or $700.00 per acre.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

Jurisdiction of the District Court was based on the provisions of 28 USC Section 1332.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit has made an unwarranted and injudicious extension and interpretation of the law regarding speculative damages, which, if allowed to stand as the law, will permit a judgment to be based on hearsay evidence of the most damaging nature and opinion evidence without any basis whatsoever. The doctrine as set forth by the Circuit Court will permit a jury to arrive at a verdict based on bias and prejudice alone with no basis in the evidence.

ARGUMENT

On the trial of this case, the following testimony was adduced:

Q Mr. Yancey, the crop that was in place on the Hereford farm in 1975, could you have sold that crop to a third person as a growing crop in the field?

A At that time--

MR. HORNBERGER,JR.: Objection. The question calls for speculation and conjecture.

THE COURT: Overruled.

A At that time I probably could. I know that crops I have grown in years past that I have been offered some pretty big money over and above costs, but I was evidently always an optimist. If they could afford to double the money, I would stay on with them. I have never sold a crop before I harvested it.

Q In your 50 years of experience in the onion business, have you known crops to be sold in the field?

A Yes, sir.

Q Do you have an opinion as to how they are valued?

MR. HORNBERGER,JR.: Defendant will object to any opinion in that it is based on speculation and conjecture.

THE COURT: Overrule the objection.

A I have known of crops that had been sold up to $1500.00. I think there is a firm here in Laredo that bought acreage in the valley one year and it's been a lot of that done. If I was to sell the crop like I've got $500.00 an acre in it up to harvest time, we usually try to double

our money when it comes like that. A man pays a thousand dollars for it, naturally he's figuring on doubling his money, and that's the way it's done where they sell it in the field.

Q Had you wanted to, could you have sold your onion crop in October of 1975?

MR. HORNBERGER,JR.: Defendant will object in that it calls for speculation and conjecture on the part of the witness.

THE COURT: Overruled.

A Really, I never tried to, but there were other crops in the lower valley that I heard had been sold.

Q (By Mr. Mann) at that point in the maturity, how would you value the onion crop, at what it could be sold for?

MR. HORNBERGER,JR.: Defendant will object on the same grounds, speculation and conjecture and based on hearsay.

THE COURT: Overruled.

A I would say that crop could have been sold at that time there for $700.00, twice what the cost was. (Lines 17 thru 25, p.129, all of p. 130 and Lines 1 thru 14, p. 131, Vol. 1, of ROA).

In its opinion, the Circuit Court, in referring to the testimony, states:

> "But even if it was error, reversal would not be warranted 'absent a showing that substantial rights of the party were affected..... The burden of demonstrating that such rights were affected rests with the party asserting error.' Liner v

J. B. Talley and Co., Inc. 618 F. 2d 327, 329 (5th Cir. 1980).Consolidated fails to suggest how any of its substantial rights were affected."

Yancey simply testifies that he probably could have sold the growing crop in the field, but substantiates his testimony by offers in previous years, what other persons have done in previous years, and in selling such a crop "we usually try to double our money". He admits he did not try to sell this crop but "he had heard that other crops in the lower valley had been sold. Then proceeding further and without giving any basis for his statement whatsoever he states "I would say that crop could have been sold at that time then for $700.00, twice what the cost was." This is not even an expression

of present opinion but only what his future opinion would be (See Webster's International Dictionary).

It is clear that the jury based their verdict on this testimony, for they found the damages to be $700.00 per acre.

At first blush, this may not seem to be a question of which this Honorable Court with its crowded docket should take cognizance, but a studied consideration of the effect of the opinion of the 5th Circuit shows that it will open the door to absolutely unjust verdicts, based on exaggerated or untrue statements by the crop owner, it will cause confusion in the law of damages, and will result in even more litigation and appeals.

In Kestenbaum v Falstaff Brewing Corporation, 514 F2d 690, 5th Cir., 1975, the Court stated:

"Under certain circumstances, however, for instance where the owner bases his estimation solely on speculative factors, the owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to the jury. Klapmeir v Telecheck International, Inc., 482 F2d 247 (8th Cir. 1973); United States v Nall, 437 F.2d 1177, (5th Cir., 1971)."

In U. S. v Nall, 437 F.2d 1177, (5th Cir.,1971), the Court stated:

"We agree also with the Seventh Circuit's statement in a case which did not involve the present statute:

'But the owner's qualification to testify does not change the 'market value' concept and permit him to substitute a 'value to me' standard for the accepted rule, or to establish a value based entirely upon speculation.' (underlining ours) United States v Sowards, 10 Cir. 1966, 370 F2d 87, 92."

In Klapmeir v Telecheck International, Inc., 482 F2d 247, 8th Circuit, 1973, the Court stated:

"Because his (the witness') statement of value was based on pure speculation, the evidence lacks any probative effect."

CONCLUSION

For the unwarranted extension of the law relating to speculative damages, and for the other errors committed by the trial court and affirmed by the Fifth Circuit, this Honorable Court should review the judgments of the Courts below.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgments of the trial court and of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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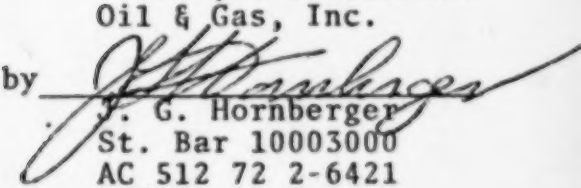
915 Victoria St.
Laredo, Texas 78040
Attorneys for Petitioner, Consolidated Oil & Gas, Inc.

by 

J. G. Hornberger
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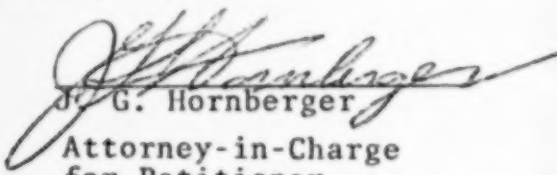
Certificate of Service

I hereby certify that on the 4th day of September, 1981, a copy of Petitioner's Petition for a Writ of Certiorari was by me mailed to Mann, Cronfel, Dickinson & Saldana, 1016 Flores, Laredo,Texas 78040, attorneys for Respondents.



J. G. Hornberger
Attorney-in-Charge
for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1627

D. C. DOCKET NO. CAL-77-78

MATTHEW W. DIETZ AND
T. J. YANCY,
Plaintiffs-Appellees,

VERSUS

CONSOLIDATED OIL & GAS, INC.,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Texas

BEFORE TJOFLAT, POLITZ and HATCHETT,
Circuit Judges.

JUDGMENT

This cause came on to be heard on transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District court in this cause be, and the same is hereby, affirmed;

It is further ordered that Defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 27, 1981

Issued as Mandate: June 1, 1981.

Opinion

Matthew W. Dietz and T. J. Yancey

Plaintiffs-Appellees

vs

Consolidated Oil & Gas, Inc.,

Defendant-Appellant

No.79-1627

United States Court of Appeals

Fifth Circuit

April 27, 1981

Lessees of surface rights brought suit against lessee of mineral right seeking to recover for flood damage to growing crops. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., entered judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) trial court properly instructed jury as to standard for determining when a cause of action for damages accrues under Texas law;

(2) owner's testimony as to value of the growing crops a moment before their destruction was admissible; and (3) evidence was sufficient to support judgment.

Affirmed.

1. Limitation of Actions

In action against lessee of mineral right for damage to growing crops of lessees of surface rights, trial court properly instructed jury as to standard for determining when a cause of action for damages accrues under Texas law.

2. Damages

In Texas, where a partial injury to a growing crop is involved, measure of damages is defference between value of crop immediately before and immediately after the injury.

3. Damages

In diversity action against lessee of mineral rights for damage to growing crops, trial court did not err in

permitting jury, in determining amount of damages under Texas law, to consider probative evidence of value other than mathematical formula of potential yield multiplied by estimated value for giving it less costs of marketing, conservation and harvesting.

4. Federal Civil Procedure

Trial court's refusal to submit defendant's requested special interrogatory bearing on issue of negligence was not error in action for damage to growing crops.

5. Evidence

In action brought against lessee of miner ' rights for damage to growing crops caused by flood, photographs of the flooded crop acreage were admissible despite fact that precise date of photographs had not been established.

6. Federal Courts

Reversal on grounds that an eviden-

tiary ruling was erroneous is not warranted absent a showing that substantial rights of the party were affected and the burden of demonstrating that such rights were affected rests with party asserting error.

7. Evidence

In action for damages to growing crops, owner's testimony concerning the growing costs of the lost crops, which was based on recollection, was not speculative.

8. Evidence

Owner's testimony as to value of the growing crops a moment before their destruction was admissible in action to recover for damage to the growing crops.

9. Evidence

Under the Texas law, an owner generally is competent to given his opinion on value of his property.

10. Federal Courts

Defendant in action for damage to growing crops failed to bear its appellate burden of showing how admission of owner's statement that he would have made profit if crops had reached maturity was prejudicial since jury's setting damages was based on specific dollars-and-cents testimony in the record and not on owner's statement.

11. Federal Courts

Defendant in action for damage to growing crops was foreclosed from challenging certain testimony on appeal where it failed to object to such testimoney at trial.

12. Waters and Water Courses

Evidence was sufficient to support judgment against lessee of mineral rights for negligently causing flood damage to growing crops of lessee of surface rights.

Appeal from the United States District Court for the Southern District of Texas.

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

TJOFLAT, Circuit Judge:

A jury rendered a verdict for plaintiffs in this diversity case. Defendant contends that the trial court erred in numerous evidentiary rulings, in its formulation of jury instructions, and in denying a motion for a directed verdict. We find no error and affirm.

I

Lasker O. Hereford owned a farm in Webb County, Texas. In 1967, she assigned the mineral rights in the farm to Consolidated Oil and Gas, Inc. (Consolidated). In 1972, she leased the surface rights to T. J. Yancey and Matthew Dietz. Yancey and Dietz are farmers.

For a time, Yancey and Dietz

and Consolidated enjoyed their respective interests in the farmland without incident. Then, in September of 1975, two things happened: Yancey and Dietz began planting onions and melons, and Consolidated, in connection with a new well, built a road and sludge pit. The road was constructed on three acres on which onions were to be planted. Consolidated paid Hereford, the landowner, $3,000 for the use of these acres. Hereford, in turn, paid this money to Yancey and Dietz to compensate them for the anticipated reduction in crop yield.

By mid-October, the road had been constructed, the sludge pit excavated, and the crops' cultivation completed. In the early morning hours of October 29, 1975, an unusually heavy rainstorm occurred. Water from the rainstorm washed down the road, rushing onto the farmland and

flooding fifty-nine acres of onion crop. The rainstorm also caused the sludge pit to overflow onto thirty additional acres of onions and fifteen acres set aside for honeydew melons.

Yancey and Deitz surveyed the flooded farmland a few days after the storm and, as they testified at trial, were unable to determine whether the flooded crops had been damaged. An examination three weeks later, however, led them to conclude that the onion crops had been damaged.

Believing Consolidated responsible for their loss, Yancey and Dietz consulted an attorney, who attempted to negotiate a settlement with Consolidated. In the meantime, they planted the honeydew melons on the previously flooded fifteen acres. These honeydews failed to mature and could not be marketed.

Yancey and Dietz were unable to negotiate a settlement with Consolidated, and, on November 15, 1977, filed suit in Texas state court. Thereafter, the case was removed to federal district court.

In its answer to the complaint, Consolidated alleged that the two-year statute of limitations tolled on October 29, 1975, and, therefore, that the suit was time-barred. Consolidated also alleged that it had violated no duty to Yancey and Dietz. Furthermore, Consolidated argued, even it it had, the violation was not the proximate cause of the injury to the crops. Finally, Consolidated alleged that Yancey and Dietz were contributorily neglient in proceeding to cultivate the honeydew crop on the flooded land.

In this appeal, Consolidated asks us to enter a judgment of no liability

pursuant to its motions for directed verdict. Alternatively, Consolidated contends that the trial judge committed reversible error in failing to charge the jury in accordance with its requested instructions, and in making several evidentiary rulings. We consider these contentions, none of which has merit, in inverse order.

II

Jury Instructions

A. Statute of Limitations

/I/ Consolidated first contends that the court incorrectly instructed the jury concerning the statute of limitations issue. In this diversity action, we must weigh Consolidated's argument under Texas law. Goodbody & Co., Inc. v McDowell, 530 F.2d 1149, 1151 (5th Cir. 1976). The Texas Supreme Court has articulated the standard for determining

when a cause of action for damages accrues.

> When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is sustained... If, however, the act of which the injury was the natural sequence was a legal injury, --by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right--then, <u>be the damage however slight,</u> limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar.

Tennessee Gas Transmission Co. v Fromme, 153 Tex. 352, 353-355, 269 S. W. 2d 336, 337-338 (Tex. 1954), quoting Houston Water Works Co. v Kennedy, 70 Tex. 233, 235, 8 S. W. 36, 37 (1888).

According to Consolidated, the above-quoted passage's application to this case requires dismissal if plaintiffs were aware or should have been aware of any damage, however slight, that took place more than two years prior to November 15, 1977, the day suit was filed. Consolidated offered as proposed special interrogatories to the jury the following:

> Do you find from a preponderance of the evidence that actual damage, however (sic) slight, to the crops and land in question was sustained by the plaintiffs prior to November 15, 1977?
>
> . . . . . .

Do you find from a preponderance of the evidence that the plaintiffs or either of them knew or in the exercise of reasonable diligence should have known on or before November 15, 1975, that their crops and land had sustained damage, however slight?

Record Excerpts at 6.

The court rejected these interrogatories, and, instead, submitted the following:

Do you find from a preponderance of the evidence that the plaintiffs or either of them knew or in the exercise of reasonable diligence should have known on or before November 15, 1975, that their crops had sustained damage?

Record Excerpts at 16. The jury answered "we do not." ID. It is Consolidated's position that the court's failure to ask the jury to determine if plaintiffs were aware of any damage, however slight,

was prejudicial error.

We cannot agree. In the first place, we think the court's question to the jury--that the jury ascertain whether Yancey and Dietz knew or should have known there was any damage before November 15--embraced all damages, even if only slight. In any event, Consolidated misinterprets the Tennessee Gas Transmission case. We think the Texas Supreme Court was simply saying that in certain tort cases, the defendant's actions themselves are a legal injury and the question of when economic injury occurred is irrelevant to when the cause of action arose. This case may or may not have involved such a tort, but since Consolidated failed to argue that it did--either here or in the court below--we do not consider the issue.

B. Damages

Consolidated next contends that the court erred in formulating it special interrogatories concerning the measure of damages. Again, we turn to Texas law, this time to determine what damages were available to a farmer whose growing crops are destroyed before harvest. Brooks Transportation Co. v McCuttcheon, 154 F.2d 841, 843 (D. C. Cir. 1946).

/2/ In Texas, "/t/here is no question but that...where a partial injury to a growing crop is involved, the measure of damages is the difference between the value of the crop immediately before and immediately after the injury." Schultz v Harless, 271 S.W.2d 696, 697 (Tex. Civ. App. 1954). Texas courts have determined such value by subtracting the costs of bringing a crop to market from the probable value of a matured crop. See Phillips Petroleum Co. v Arrington, 318

S.W.2d 694, 697-698 (Tex. Civ. App. 1958).

/3/ The district court gave the jury the following special interrogatory concerning the damage to both the destroyed onion and honeydew acreage: "What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate the plaintiffs for the damages /to the crops/?" Record Excerpts at 15-16. The court instructed the jury to approach this damages question as follows:

> The proper measure of damage for the wrongful destruction of a growing crop is the value of the crop as it stood on the ground at the time and place of its destruction. The stage of growth of a crop is a factor to be considered in determining the amount which will compensate the injured parties for the loss suffered by the destruction of the crop.

The jury should consider the probable yield of the crop under proper cultivation, the value of the yield when matured and ready for sale, the amounts expended thereafter in cultivating, harvesting, and marketing the crop in determining the value thereof at the time of its destruction.

Supp. Record, vol. II at 405.

Consolidated contends that this charge is in error because it permits the jury to consider evidence other than that pertaining to the probable yield, the value of a mature crop, and the costs, actual or potential of cultivation, harvesting and marketing. In particular, the court's charge allowed the jury to consider testimony probative of what a purchaser of crops in the ground would have paid for the crops the day before destruction. According

to Consolidated, the jury could not consider such testimony in arriving at damages, but instead should have been required to adhere to the mathemetical formula of potential yield multiplied by estimated value per unit of yield less costs of marketing, cultivation and harvesting.

The Texas Supreme Court has stated, however, that the formula is only a "general rule" that "in most cases(will) give the value of the growing crop with as much certainty as can be attained by any other method." International & G.N.R. Co. v Pape, 73 Tex. 501, 503, 11 S. W. 526, 527 (Tex. 1889) (emphasis supplied). The reason for using this standard is that "a growing crop...is not usually subject to sale, and...there is ordinarily no market..." San Antonio & A. P. R. Co. v Kiersey, 81 S.W. 1045, 1047 (Tex. Civ. App. 1904), rev'd on

other grounds, 98 Tex. 590, 86 S.W. 744 (Tex. 1905).

We think it beyond peradventure that the mathematical formula measure of damages was never intended by Texas courts to place a ceiling on damages, nor to state the only acceptable means of determining damages; rather, the formula is merely one method for estimating the value of growing crops. See Boyett v Enders, 456 S. W. 2d 701, 702 (Tex. Civ. App. 1970). As a general rule, the formula may well be the most accessible means of estimating damages, but we have been pointed to no authority suggesting that other evidence probative of value may not be used as well. In the case before us there was other evidence of value, and we do not believe the court erred in formulating instructions that permitted the jury to consider it.

C. Negligence

/4/ Consolidated submitted a number of special interrogatories that it believed were relevant to whether it was negligent. These interrogatories inquired (1) whether the flood was an "Act of God"; (2) whether the design and construction of the road and sludge pit were dictated by the husband of Lasker Hereford, owner of the land; and (3) whether the damage was caused by a combination of the rain and Consolidated's negligence, if any. The district court, however, simply submitted interrogatories asking the jury whether Consolidated was negligent in constructing the road and the sludge pit and, if so, whether the negligence was a proximate cause of plaintiffs' injuries. Consolidated contends that limiting the interrogatories to these two

questions was error.

We are unable to agree. Concerning the first requested interrogatory, the district court charged the jury that if plaintiffs' injuries resulted from an "act of God," they should find that defendant's negligence, if any, was not a proximate cause of plaintiffs' injuries. Supp. Record, vol. II at 404. The court's decision not to expound further on this issue with a separate interrogatory was hardly an abuse of discretion. See Reagan v Sinclair Refining Co., 319 F.2d 363, 366 (5th Cir. 1963), cert. denied, 376 U.S.956 84 S. Ct. 975, 11 L. Ed 2d 974 (1964). As to the second requested interrogatory, we are unable to understand how an affirmative answer to it would have excused Consolidated's from liability. The evidence is undisputed that Mr. Hereford, as Consolidated's contractor or employee,

designed and constructed the road and sludge pit. It may be that an inference can be drawn from this evidence that he was negligent. But Consolidated has pointed us to no Texas law that would excuse it from the negligence of either an employee or contractor under these circumstances. Concerning the final interrogatory, we cannot conceive of its relevance to the issue of negligence or proximate cause, and Consolidated's brief suggests none. Thus, we hold that the district court's refusal to submit these interrogatories to the jury was proper.

III

Evidentiary Rulings

Consolidated contends that eight of the district court's evidentiary rulings constituted reversible error. We consider each of these alleged errors

below.

/5/ The first purported error concerns consolidated's objection to the introduction of certain photographs of the flooded onicn acreage. The date the photographs were taken was not established; thus, the basis for the objection was apparently that they were inadequately authenticated. See Brief of Appellant, at 11-14. At trial, however, plaintiffs offered to delay introduction of the photographs until the relevant date was established:

> /Counsel for Plaintiffs/ Your honor, I would offer these into evidence at this time. If Counsel would prefer that we establish the date of this photograph more precisely at a later time, we can withhold it. But I think he has had

an opportunity to look at it, and I think this witness had indicated that it does fairly depict what is there.

/Counsel for Defendant:/ Defendant would object until the proper predicate is laid, YourHonor.

THE COURT: You are objecting to the offer?

/Counsel for Defendant:/ Yes, sir.

THE COURT: Overruled. They will be admitted.

Supp. Record, vol. 1 35-36.

/6/ The photos had been identified by Yancey prior to their offer; the only arguably objectionable feature of this authentication was that the precise date of the photographs had not been established.

The district court must have concluded from the quoted colloquy that Consolidated was attacking the offer on some ground other then plaintiffs' failure to establish that the photographs accurately protrayed the farmland at the time of the flooding, and since no other valid grounds appeared to exist, the court overruled the objection. This was not error. But even if it was error, reversal would not be warranted "absent a showing that substantial rights of the party were affected...The burden of demonstrating that such rights were affected rests with the party asserting error." Liner v J. B. Talley and Co., Inc., 618 F.2d 327, 329 (5th Cir. 1980). Consolidated fails to suggest how any of its substantial rights were affected.

/7/ Consolidated's next three

objections go to Yancey's testimony concerning the growing costs of the lost crops. Consolidated claims that Yancey's testimony was speculative and a mere estimate because Yancey stated that his figure may have been off "a dollar one way or the other," and because precise data may have been available from books of account that Yancey had examined sometime before trial. Supp. Record, vol. I at 119-120. None of this renders incompetent Yancey's testimony concerning growing costs. The books of account were obviously available to Consolidated on discovery, and could have been used to impeach Yancey's figures. But since Yancey was testifying only as to his recollection of growing costs, his testimony was admissiable for whatever value it might have had.[1] Yancey's testimony

may have been sketchy, it may have been based on poor memory, and it may have been wrong--but being based on recollection rather than mere hypothesis and conjecture, it was not speculative.

/8, 9/ Consolidated next objects to Yancey's testifying as to the value of the growing crops the moment before their destruction. According to Consolidated, this was inadmissible opinion testimony based solely on speculation and conjecture. We disagree. The general rule is that "an owner" is competent to give his opinion on the value of his property." Kestenbaum v Falstaff Brewing Corp., 514 F.2d 690, 698 (5th Cir. 1975), modified and other grounds en banc, 575 F.2d 564 (1978), cert. denied,

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[1]Consolidated does not argue that Yancey's testimony was adduced to prove the contents of existing books of account. Thus, we do not here consider whether his testimony may have been subject to attack under the best evidence.

424 U.S. 943, 99 S. Ct. 1218, 47 L.Ed. 349 (1979); see also Justice v Pennzoil Co., 598 F. 2d 1339, 1344 (4th Cir., cert. denied sub nom., 444 U.S. 967, 100 S. Ct. 457, 62 L. Ed. 2d 380 (1979) (landowner's testimony on value of his land is admissible). Consolidated, however, notes that "where the owner bases his estimation solely on speculative factors, the owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to the jury." Kestenbaum v Falstaff Brewing Co., 514 F.2d at 699. Consolidated argues that Yancey's estimate was based solely on speculative factors. The record does not bear this out. Yancey testified that he personally knew of standing crops of other farmers that had been sold, and, also that value of standing crops is often computed at twice the amount of

growing costs. Supp. Record vol. I at 130-131. Thus, his opinion testimony was based on more than naked conjecture, and we think the district court acted properly in admitting it. "The weight of such testimony, is, of course, affected by the owner's knowledge of circumstances which affect value, and as an interested witness, it is for the jury to evaluate the credibility of his testimony" Bershire Mutual Insurance Co. v Moffett, 378 F.2d 1007, 1011 (5th Cir. 1967) (footnotes omitted).[2]

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[2] In this appeal, Consolidated seeks to discredit Yancey's opinion testimony by asking us (rather than the district court)to take judicial notice that any sales of growing crops on which Yancey based his opinion could not have been comparable because of (1)the length of the relevant growing season; and (2) the size of the valley in which the Hereford farm was located. Supplemental Brief of Appellant, at 16. Of course, such evidence could have been presented to the jury. But even assuming that we could take notice of the growing

/10/ Consolidated's next objection is to Dietz's testimony that if he could have sold the lost onions at $2.07 per bag --the average price he realized for his onions in 1975--he would have made a profit. Supp. Record, vol. II at 221-223. Without determining whether Consolidated's objection to this testimony should have been sustained, we think we can dispose of the objection on the ground that Consolidated has failed to bear its appellate burden of showing how admission of the statement was prejudicial. The jury's setting damages at the level it did was plainly based on specified dollars-and-cents testimony in the record, and not on Dietz's statement that he would have made a profit had the flooded onion crop reached maturity.

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season's length and the valley's size, we certainly could not judicially notice the inferences Consolidated implicitly asks us to draw.

/117 Finally, Consolidated objects to testimony that it paid 3,000 dollars for the three acres of onion field on which it constructed its road. Consolidated claims that unrebutted evidence offered at trial demonstrated that this money was paid to Mrs. Hereford and that no inference legitimately could be drawn that the money was to compensate Yancey and Dietz for their lost onion acreage. Even were the record to support this hypothesis, Consolidated is foreclosed from raising the point on appeal since it failed to object to this testimony at trial. Supp. Record, vol. I at 19.

IV

Sufficiency of Evidence

/12/ Consolidated moved for a directed verdict at the close of plaintiffs' presentation of its case-in-chief and at the conclusion of its defense. It now argues that these motions should have been granted because the evidence was insufficient to support the jury findings in favor of plaintiffs. It is, however, "settled that in the absence of a motion for judgment notwithstanding the verdict made at trial this Court cannot examine the evidence for sufficiency..." Delchamps, Inc. v Borkin, 429 F.2d 417, 418 (5th Cir. 1970). Since Consolidated failed to move for a judgment n. o. v. following the jury's verdict, we are without power to consider the merits of its contention. But even if we did have the power to review the sufficiency of the evidence,

Consolidated would fare no better. The standard for determining evidentiary sufficiency was articulated by this circuit in Boeing Co. v Shipman, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc) (footnote omitted):

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence--not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict,

granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict.

> There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as to the traditional finder of the facts, and not the Court to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

After careful review of the record, we have determined that the jury's verdict must be upheld under the standard. Therefore, the judgment of the district court is

AFFIRMED.

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-1627

MATTHEW W. DIETZ AND T. J. YANCEY,

Plaintiffs-Appellees,

versus

CONSOLIDATED OIL & GAS, INC.

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(May 20, 1981)

Before TJOFLAT, POLITZ and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is

denied.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

(Filed 12/15/77)

Cause No. 30,523

Matthew W. Dietz, et al () In the 111th District

vs () Court of Webb County

Consolidated Oil & Gas, Inc. () Texas

PLAINTIFFS' ORIGINAL PETITION

MATTHEW W. DIETZ and T. J. YANCY, plaintiffs, complaining of CONSOLIDATED OIL & GAS, INC., Defendant, show:

THE PARTIES

Plaintiffs are residents of Webb County, Texas. Defendant is a corporation incorporated under the laws of the State of Colorado. It's agent for service is C.T. Corporation System, Republic National Bank Building, Dallas, Texas.

FIRST COUNT

1. During all times pertinent to plaintiffs' cause of action, Plaintiffs occupied the following land in Webb County Texas, as agricultural tenants:

That portion of the farm known

as the Bluerock Farm located on the south end of Porciones 52 and 53 of Webb County, and being located west of the Espejo-Molina Road about ten (10) miles southeast of the City of Laredo, Webb County, Texas, and being a part and portion of the total of one thousand forty-four (1,044) acres, as shown on Exhibit "A" hereto, being the lands located between the Espejo Road on the east and the double fence on the west.

2. In November of 1975, defendant for the purpose of drilling a well in seach of oil and gas and marketing oil and gas from the above described land under an oil, gas and mineral lease entered upon said premises.

3. At that time, plaintiffs had already planted approximately 300 acres of onions on said land. Defendant, in

connection with its drilling operations, graded the land for a drillsite and constructed roads to such drillsite and further constructed a slush pit near the drillsite. Defendant, its agents and employees were negligent in performing such work and thereafter were negligent in maintaining the slush pit, and each and all of said negligent acts, separately and collectively, were the proximate cause of the injuries and damages to plaintiffs' onion crop as described below:

(a) In changing the natural drainage of the land in such a way that defendant knew, or in the exercise of ordinary care should have known, that rainwater would be collected whereby it would flood plaintiffs' onion crop.

(b) In constructing the slush pit in such a way that defendant knew, or in the exercise of ordinary care should have known, that rainwater would cause it to

overflow and burst open the slush pit thereby flooding plaintiffs' onion crop.

(c) In failing to properly maintain the slush pit by failing to keep the fluid level in the slush pit at a proper level.

4. As a result of such negligence rainwater did overflow and the improperly constructed and maintained slush pit burst open and approximately 59 acres of plaintiffs' onion crop were flooded and totally destroyed to plaintiffs' damage in the sum of $84,000.00.

SECOND COUNT

1. Plaintiffs reallege the allegations in paragraphs 1, 2, and 3 of First Count as if set out in this count in haec verba.

2. In the spring of 1976, plaintiffs planted the premises in honeydew melons, after the flooding described in First

Count, but the soil covering approximately 30 acres of the flooded land had been so polluted by said flooding that the crop budded, but failed to mature.

3. As a result of plaintiffs' negligence in causing the flooding of the land as described in First Count, plaintiffs suffered the total loss of their honeydew melon crop on approximately 30 acres of land to their damage in the sum of $16,000.00.

THIRD COUNT

Plaintiffs reallege the allegations in Paragraphs 1, 2, and 3 of First Count as if set out in this count haec verba. The soil covering approximately thirty (30) acres of the flooded land was so polluted by said flooding that plaintiffs have been denied the profits which they would have realized from the onion crop which would have been planted

thereon and harvested in 1977 and will be denied the profits which they could reasonably expect from future crops which would have been planted on said thirty (30) acres during the balance of the period that Plaintiffs are in possession of the premises to the plaintiffs' damage in a sum in excess of $50,000.00.

PRAYER

WHEREFORE plaintiffs pray:

1. That defendant be cited to appear and answer herein;

2. For judgment for (a) $84,000.00 with legal interest from the date of the destruction of the onion crop until time of trial, (b) for $16,000.00 with legal interest from the date of the loss of the honeydew melon crop until time of trial, (c) for $50,000 for lost profits, (d) for interest at the rate of 9% per annum from date of final judgment on $150,000 the total amount claimed;

3. For such other relief, general and special, to which they may be justly entitled;

4. For costs of suit.

MANN, CRONFEL, DICKINSON
and SALDANA
P. O. Box 880
Laredo, Texas 78040

by /s/ LAWRENCE A. MANN
LAWRENCE A. MANN

(Exhibit A omitted)

(Filed February 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

MATTHEW W. DIETZ, ET AL	()	C. A. NO.
VS	()	L- 77-78
CONSOLIDATED OIL & GAS, INC.	()	

DEFENDANT'S SECOND AMENDED ORIGINAL ANSWER

TO THE HONORABLE THE SAID COURT:

Consolidated Oil & Gas, Inc., defendant, files this its second amended original answer to Plaintiffs' Original Petition, and respectfully states:

FIRST DEFENSE

The said petition fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

The several claims stated in the several counts of Plaintiffs' petition on file herein did not, nor did any of them accrue within two years next before the commencement of the suit, and there-

fore the action is barred by the two year statute of limitation of the State of Texas.

THIRD DEFENSE

The damages, if any, sustained by the plaintiffs as a result of the flow of water onto the land in question and the breaking of the slush pit in question were the results of an unprecedented and unusually heavy rainstorm that occurred on or about the 28th day of October,1975, and the 29th day of October, 1975,inclusive, in Webb County, Texas, and vicinity. The defendant could not have reasonably anticipated and guarded against this unprecedented rainfall and flooding which were the sole proximate cause of any damage to the plaintiffs. The damages, if any, sustained by the plaintiffs were caused by an Act of God or nature, for which the defendant was and is in no sense responsible.

FOURTH DEFENSE

1. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth with respect to the allegations contained in Paragraph 1 under First Count of Plaintiffs' Original Petition.

2. Defendant admits the allegations of Paragraph 2 under First Count.

3. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth with respect to the allegations contained in the first sentence of Paragraph 3, First Count; defendant admits the allegations contained in the second sentence of said Paragraph 3, First Count; and denies the allegation contained in the balance of said Paragraph 3, First Count.

4. Defendant denies the allegations of Paragraph 4 under First Count.

5. Defendant answers to Paragraph 1 under Second Count of said Petition in the

same way, as it answered Paragraphs 1,2 and 3 of the First Count.

6. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth with respect to the allegations contained in Paragraphs 2 of the Second Count of Plaintiffs' Original Petition.

7. Defendant denies the allegations of Paragraph 3,Second Count of Plaintiffs' Original Petition.

8. Defendant answers to the first sentence of the Third Count in the same way as it answered Paragraphs 1,2, and 3 of the First Count. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth with respect to the allegations contained in the balance of said Third Count.

9. Defendant further states that all allegations of said Petition not hereby specifcally admitted are specifically

denied.

WHEREFORE, defendant prays that plaintiffs take nothing by their suit and that this defendant go hence with its costs without day and that it have such other and further relief as it may be entitled to in the premises.

RAYMOND J. GOODMAN
518 Matamoros
Laredo, Texas 78040

J. G. HORNBERGER
J. G. HORNBERGER,JR.
915 Victoria St.
Laredo, Texas 78040

Attorneys for
Defendant

by /s/ J. G. HORNBERGER
J. G. Hornberger

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF TEXAS
LAREDO DIVISION

MATTHEW W. DIETZ, ET AL ()
C. A. NO.
VS () L-77-78

CONSOLIDATED OIL &
GAS, INC. () Filed 2/5/79

PLAINTIFFS' SUPPLEMENT TO THEIR
ORIGINAL PETITION

TO THE HONORABLE THE SAID COURT:

Plaintiffs file this supplement to their complaint, herein designated as "Plaintiffs' Original Petition", and respectfully state:

1. Plaintiffs' original petition in Cause No. 30,523 in the 111th District Court of Webb County,Texas, styled Matthew W. Dietz et al v Consolidated Oil & Gas, Inc., removed to this court and now docketed herein as Cause No. L-77-78, was filed on November 16, 1977.

2. The cause of action plead herein did not accrue until on or after November 17, 1975, as plaintiffs did not know and

and on exercise of due diligence could not have known that the acts of defendant herein complained of could have damaged these plaintiffs or their property.

3. In any event, any running of the statute of limitations from date of accrual of this cause of action was stayed for a reasonable period of time as a result of representations made by counsel for the defendant as to settlement, which induced plaintiffs to further delay filing of this action.

4. The rainfall which occurred was not outside of the range of ordinary experience and under the standard of reasonable care should have been guarded against.

WHEREFORE, plaintiffs pray for the relief sought in their said complaint, designated "Plaintiffs' Original Petition."

MANN, CRONFEL, DICKINSON & SALDANA

1016 Flores
Laredo, Texas 78040

by /s/ LAWRENCE A. MANN
Lawrence A. Mann

ATTORNEYS FOR PLAINTIFFS

(Filed February 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

MATTHEW W. DIETZ, ET AL ()

VS () C. A. NO. L-77-78

CONSOLIDATED OIL & GAS, INC.
()

ANSWER OF THE DEFENDANT TO
PLAINTIFFS' SUPPLEMENTAL
ORIGINAL COMPLAINT

TO THE HONORABLE THE SAID COURT:

Consolidated Oil & Gas, Inc., defendant, files this its answer to Plaintiffs' Supplement to their Original Complaint and states:

1. This defendant admits the allegations contained in Paragraph No. 1 of said Supplemental Original Complaint.

2. This defendant denies the allegations contained in Paragraphs Nos. 2, 3, and 4 of said Supplemental Original Complaint.

WHEREFORE, Defendant prays that plaintiffs take nothing by their suit and that this defendant recover its costs.

J. G. HORNBERGER
J. G.HORNBERGER, JR.
915 Victoria St.
Laredo, Texas 78040

RAYMOND J. GOODMAN
518 Matamoros
Laredo, Texas 78040

Attorneys for Defendant

by /s/ J. G. Hornberger

A copy of the above and foregoing Answer was delivered to Mr. Lawrence A. Mann, attorney for plaintiffs, on the 5th day of February, 1979.

/s/ J. G. Hornberger

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT

OF TEXAS

LAREDO DIVISION

MATTHEW W. DIETZ AND T. J. YANCEY

C.A.L-77-78

VS

CONSOLIDATED OIL & GAS, INC.

(Filed February 13,1979)

JUDGMENT

The above entitled action having proceeded to trial before the Honorable Robert O'Conor, Jr. and a jury, commencing on February 5, 1979; and at the conclusion of the evidence the jury having answered the following stated interrogatories in the affirmative:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the defendant was negligent in the manner that it constructed the road which led from the

County Road to its drillsite on the Hereford Farm?

ANSWER: "We do" or "We do not".

ANSWER: We do.

SPECIAL ISSUE NO. 2

Do you find from a prepponderance of the evidence that such negligence, was a proximate cause of damage, if any, to plaintiffs' fifteen (15) acres of onion located to the north of said road?

ANSWER "We do' or "we do not"

ANSWER: WE DO.

SPECIAL ISSUE NO. 3

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate the plaintiffs for the damages, if any, occasioned their onions on the fifteen (15) acres located north of the road?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $10,500.00 ($700.00 per acre)

SPECIAL ISSUE NO. 4

Do you find from a preponderence of the evidence that the defendant was negligent in the manner that it constructed or caused to be constructed the slush pit at its drillsite on the Hereford Farm?

ANSWER: "We do" or "We do not"

ANSWER: We do.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Defendant was negligent in failing to properly maintain the slush pit at its drillsite on the Hereford Farm?

ANSWER: "We do" or "We do not"

ANSWER: We do.

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that such negligence was a proximate cause of damage, if any, to forty-four (44) acres of onions located around the wellsite?

ANSWER "We do" or "We do not"

ANSWER: We do.

SPECIAL ISSUE NO. 7

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate the plaintiffs for the damages, if any, occasioned their forty-four (44) acres of onions located around the wellsite?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $30,800.00 ($700.00 per acre)

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such negligence was

a proximate cause of damage, if any, to thirty (30) acres of honeydews thereafter planted around such wellsite?

ANSWER: "We do" or "We do not"

ANSWER: We do.

SPECIAL ISSUE NO. 9

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate the plaintiffs for the damages, if any, occasioned their thirty (30) acres of honeydews thereafter planted around the wellsite?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $12,000.00 ($400.00 per acre.

and having further answered the following interrogatories in the negative:

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that the plaintiffs or

either of them knew or in the exercise of reasonable diligence should have known on or before November 15, 1975, that their crops had sustained damage?

Answer: "We do or "We do not"

ANSWER: We do not.

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that the plaintiffs were negligent in failing to get soil sample on the thirty (30) acre honeydew tract prior to the time the honeydews were planted?

ANSWER: "We do" or "we do not"

ANSWER: We do not.

and having hereby returned a verdict on the 9th day of February 1979, for plaintiffs in the sum of $53,300.00.

It is accordingly ordered that judgment in the sum of $53,300.00, together

with interest thereon from date hereof until paid at the rate of nine percent (9%) per annum, be entered in favor of Matthew W. Dietz and T. J. Yancy, plaintiffs, and against Consolidated Oil & Gas, Inc., defendant, with costs.

DONE AND ORDERED at Laredo, Texas, this 13th day of February, 1979.

/s/ ROBERT O'CONOR, JR.
U. S. DISTRICT JUDGE

(filed February 13, 1979)

Opposition

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-459

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONSOLIDATED OIL & GAS, INC.

PETITIONER

VS.

MATTHEW W. DIETZ AND T. J. YANCEY

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LAWRENCE A. MANN
Mann, Dickinson & Saldana
P. O. Box 880
Laredo, Texas 78042-0880
(512) 723-5575

ATTORNEYS FOR RESPONDENTS

NO. 81-459

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONSOLIDATED OIL & GAS, INC.

PETITIONER

VS.

MATTHEW W. DIETZ AND T. J. YANCEY

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RESPONDENTS' BRIEF IN OPPOSITION

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CASE CITATIONS

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARGUMENT

The issue in the present case is narrow and unique to its facts. Petitioner complains of admission into evidence of testimony by the farmer-owner as to the value of the destroyed crops. Petitioner, after reviewing excerpts of the trial transcript, states that the testimony established a value based upon speculation. It is with this opinion that Respondents take issue.

An owner may testify to the value of his property. United States v. 179.26 Acres of Land in Douglas County Kansas, 644 F.2d 367, 372 (10th Cir. 1981);

South Central Livestock v. Security State Bank, 614 F.2d 1058, 1061, (5th Cir. 1980); Meredith v. Hardy, 554 F.2d 764, 765 (5th Cir. 1977); Kestenbaum v. Falstaff Brewing Corporation, 512 F.2d 690, 698 (5th Cir. 1975); U. S. v. Sowards, 370 F.2d 87, 92 (10th Cir. 1966). These cases all recognize that an owner is presumed to have special knowledge in regard to the value of his property.

An owner has uniformly been recognized by the Courts to be competent to testify as to the market value of his own property. The presumption of an owner's special knowledge as to the value of his own property can be negated if it is shown through his own testimony that the owner bases his opinion upon facts that bear no relationship to the

value of his property. U. S. v. Sowards, 370 F.2d 87, 92 (10th Cir. 1966). If the owner's testimony is demonstrated to be based solely on speculative factors, it may then be regarded of such minimal probative force as to warrant the Court's refusal to submit the issue to the jury. Kestenbaum v. Falstaff Brewing Corporation, 514 F.2d 690, 699 (5th Cir. 1975). However, where the owner's testimony is based upon factors that are not speculative, his testimony does have probative force, and the manner in which he testifies, or the method by which he arrives at his opinion of the value, go to the weight rather than the admissability of the evidence. Meredith v. Hardy, 554 F.2d 765, 766 (5th Cir. 1977); U. S. v. 3,698.63 Acres of Land, etc., 416 F.2d 65, 68 (8th Cir. 1969).

To rebut the owner's opinion as to the value of his property, the opposing party should either present contrary evidence or impeach the owner's opinion through cross-examination. Meredith, supra at 765; Kestenbaum v. Falstaff Brewing Corporation, 514 F.2d 690, 699 (5th Cir. 1975).

The Petition discloses the method by which the witness estimated the value of the property in question. Petitioner should have rebutted this testimony either on cross-examination or by the introduction of contradictory evidence. This it did not do.

The testimony quoted in the Petition discloses that the witness' testimony on the value of his property was based upon factors which included: (1) knowledge that onion crops are custo-

marily sold in the field; (2) the price at which such crops are sold; and (3) the location of the onion crops that had been sold in the field in proximity to the crop at issue. Such testimony indicates that the witness based his opinion on the value of his crop on factors that were neither speculative nor lacking in probative force. Hence, petitioner's argument goes to the weight rather than the admissability of the testimony in question.

If Petitioner's Question Presented can be construed to challenge the law of damages applied in the State of Texas, it is evident that this contention would be without merit. Texas applies the well established rule that the value of crops in the field can be adequately established by testimony of their value

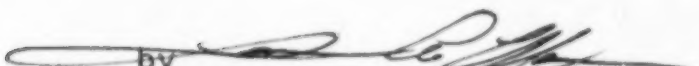
at the time of destruction since crops in field have a market value. International & G.N.R. Co. v. Pape, 73 Tex. 501, 503, 11 S.W. 526, 527 (Tex. 1889); Phillips Petroleum Co. v. Arrington, 318 S.W.2d 694, 697, 698 (Tex.Civ.App. 1958); Schultz v. Harless, 271 S.W.2d 696, 697 (Tex.Civ.App. 1954).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

Lawrence A. Mann
Mann, Dickinson & Saldana
P. O. Box 880
Laredo, Texas 78042-0880
(512) 723-5575
Attorneys for Respondents



by
Lawrence A. Mann

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 1981, a copy of Respondents' Brief in Opposition was by me mailed to J. G. Hornberger, Hornberger & Hornberger, 915 Victoria St., Laredo, Texas 78040, attorneys for Petitioner.

Lawrence A. Mann

Attorney-in-Charge for
Respondents